

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Annual Assessment of the Status of
Competition in the Market for the
Delivery of Video Programming

MB Docket No. 06-189
MB Docket No. 05-311

**COMMENTS OF ANNE ARUNDEL COUNTY
AND MONTGOMERY COUNTY, MARYLAND**

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SUMMARY

Local franchising has facilitated the spread of competition in the video programming market. Local communities have consistently sought to promote competition, using franchises to permit competing entities to use public property. Local governments are accountable to their citizens and have every incentive to promote their citizens' interests in lower prices, better service, and competitive choice, as well as economic development.

In those few cases where cable operators were willing to compete with each other prior to the late 1990s, local communities welcomed the competitors. For example, much of Anne Arundel County has been served by two franchised cable operators since 1985. The County has used its franchising authority to prevent mergers that would have eliminated competition.

When more companies began seeking to overbuild in the mid-1990s, local communities again opened their public rights-of-way to the newcomers (for example, Montgomery County's franchise grant to Starpower in 1999). When incumbent local exchange carriers (ILECs) decided to enter the video market in their service areas, local communities sought to accommodate their legitimate needs, as illustrated by Verizon's experiences in the Washington, D.C. area. Local franchises' build-out requirements significantly accelerate the expansion of cable systems and of video competition. ILEC complaints about local franchising are unfounded, generally failing even to identify the communities about which they complain.

The evidence to date appears to indicate that state franchising has had very little effect in facilitating ILEC entry into cable (for example, in Texas and Virginia). Rather, it has primarily resulted in reducing the benefits provided to the public by incumbent cable operators. The Commission should require ILECs and cable MSOs to provide more detailed information on these developments.

Public, educational, and governmental access channels are the pre-eminent examples of local programming. The variety of local needs and interests in this area is illustrated by the differing requirements of specific franchises. The Commission should be especially attentive to the fact that non-traditional PEG arrangements developed by local governments in negotiations with their cable operators, such as PEG-on-demand, can represent fruitful alternatives for meeting such local needs and interests.

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I. INTRODUCTION

Anne Arundel County, Maryland, and Montgomery County, Maryland (together referred to herein as the “Maryland Counties”¹) respectfully submit these Comments in response to the Notice of Inquiry, FCC 06-154, released by the Commission on October 20, 2006 (“NOI”).²

From their unique perspective as local franchising authorities, the Maryland Counties address the specific issue of the contributions of local cable franchising to the advancement of competition in the video marketplace.³ The local franchising process has facilitated the spread of cable competition (contrary to the claims of some industry commenters). By contrast, moving the control of cable franchises to the state level has produced little, if any, significant benefit.

¹ These counties also filed comments as part of a larger group referred to as the “Maryland Counties” in the related proceeding on local franchising, MB Docket No. 05-311.

² *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, Notice of Inquiry, FCC 06-154 (October 20, 2006).

Any attempts to impose additional federal regulations on local communities would be equally unproductive.

The issue of local franchising is the point of connection between this proceeding and the Commission's separate rulemaking proceeding on that subject, Media Bureau Docket No. 05-311.⁴ The Maryland Counties request that these comments also be incorporated in Docket No. 05-311, and that prior filings made by the participants in these comments similarly be incorporated in Docket No. 06-189.⁵

II. LOCAL FRANCHISING HAS FACILITATED THE SPREAD OF COMPETITION IN THE VIDEO PROGRAMMING MARKET.

A. Local Governments Have Consistently Sought to Promote Competition.

To provide video programming over wireline networks, a multichannel video provider needs to use other people's property – the public rights-of-way, which are the property of, and under the management of, the local community.⁶ A “franchise” is the means by which a governmental entity makes this use possible. A local community issues franchises to enable

³ The Commission raises this issue in ¶¶ 11-12 of the NOI.

⁴ *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television and Consumer Competition Act of 1992*, MB Docket No. 05-255, Notice of Proposed Rulemaking (November 18, 2005). That docket is cross-referenced in ¶ 11 of the NOI.

⁵ See Comments of Anne Arundel County, Carroll County, Charles County, Howard County, and Montgomery County, filed Feb. 13, 2006; Reply Comments of Anne Arundel County, Carroll County, Charles County, Howard County, Montgomery County, and the City of Baltimore, Maryland, filed March 28, 2006 (“Maryland Counties Reply Comments”).

⁶ On use of the public rights-of-way *see generally* Frederick E. Ellrod III and Nicholas P. Miller, *Property Rights, Federalism, and the Public Rights-of-Way*, 26 Seattle U. L. Rev. 475 (2003).

private entities to use its public property to provide services to its citizens.⁷ Like a lease, a franchise allows the use of that property subject to certain terms and conditions, including fair compensation to the landlord.⁸ Thus, a franchise is not a mode of “regulation.”⁹ A franchise is not a barrier to entry; rather, it is a *means* of entry.

Local governments represent their citizens’ interests, and local officials are held accountable by their constituents. Thus, local governments promote their citizens’ interests in (among other things) lower prices, better service, and choice among competitive video service providers. Their decisions and policies are geared toward enabling competitors to enter the market. At the same time, a local government must accept its fiduciary responsibility to represent *all* its citizens’ interests – for example, the further interest in obtaining a fair price for the private use of public property. So a local government’s role is not to give away local property immediately on the terms most favorable to the lessee. Rather, a local government seeks to reach an agreement that achieves the best balance of all its citizens’ interests. It has every incentive to do so as quickly as possible, consistent with that balance.

In fact, local communities have been in the competition business for over a century. They vied with each other to become railroad hubs, and later to ensure that interstate highways did not

⁷ Franchises may also be granted by other governmental entities for similar purposes. For example, in some states cable franchises are granted by the state government rather than local governments. On the recent developments in this area, *see* Section III below.

⁸ Such terms and conditions also normally include requirements as to how the property is treated and stipulations as to what happens if the tenant defaults. Thus, for example, a security deposit is standard fare in a lease agreement, a tenant may be required to repair any damage done to the walls in hanging pictures, and so forth.

⁹ In this context, it is important to recognize that industry comments complaining about “regulation” in the local franchise process are generally wide of the mark. In particular, Verizon’s Nov. 8, 2006, *ex parte* letter is noteworthy for introducing the red herring of “*economic* regulations.” No cable franchise agreement engages in economic regulation of the

pass them by. Now they compete with each other to encourage advanced communications systems as engines of 21st-century economic development. Most communities have economic development offices whose goal is to encourage businesses to locate there, to foster job growth, and to improve the local economy. For example, Anne Arundel County supports the Anne Arundel Economic Development Corporation (“AAEDC”) to provide assistance to new businesses.¹⁰ The Montgomery County Department of Economic Development has a similar mission.¹¹ In the St. Louis County area of Missouri, there are 95 separate municipalities in addition to the City of St. Louis; these jurisdictions historically have competed fiercely with each other for jobs, new businesses, shopping malls, and entertainment districts. The City of St. Louis hosts the St. Louis Development Corporation, the Mayor’s Business Assistance Center, the St. Louis Agency on Training & Employment, all of whose missions focus on various types of development.¹²

Economic development organizations such as these are alert to businesses’ need for advanced communications systems, over and above the needs of individual residents. They are aware that businesses may choose locations based on the availability of high-speed communications, among other things. Thus, when cable franchises are in question, these agencies frequently seek ways to encourage cable providers to serve wider areas to provide a broader selection of services for the business community. For example, a June 2005 needs assessment commissioned by Anne Arundel County noted the specific need to extend broadband

sort applied to traditional telephone services (nor could it do so under 47 U.S.C. § 543). Verizon’s fears of economic regulation have nothing to do with the local franchising process.

¹⁰ The Corporation’s Web site is at www.aaedc.org.

¹¹ See <http://www.montgomerycountymd.gov/mcgtmpl.asp?url=/Content/DED/index.asp>.

¹² See <http://stlouis.missouri.org/development/index.html>.

service to established business districts and to businesses near BWI Airport.¹³ In St. Louis, the expansion of the cable system has been essential to the development of the burgeoning downtown loft district since 2001. Developers needed and wanted landline video/data services. They were able to gain these services because of the requirements of the local cable franchise.

A community's interest in competing for the attention of businesses thus provides an additional incentive for local communities to encourage the development of advanced communications networks, including cable systems. A local community already has plenty of incentive to facilitate entry into the broadband market, without need of federal regulation to tell it to do so.

Because of their interest in expanding advanced systems and competitive options for their citizens and businesses, as well as for government communications services, local governments have been frustrated for years by the unwillingness, in most cases, of cable multiple system operators (MSOs) and, since 1996, of some incumbent local exchange carriers (ILECs) to enter video markets that are already served by incumbent cable operators. They applaud the initiatives of certain providers in the last several years to engage in such "overbuilds," spearheaded by pioneers such as RCN and more recently joined by ILECs such as Verizon. However, they have

¹³ See, e.g., p. 33. See also *id.* at 50 (AAEDC's interest in making videoconferencing capability available to local businesses). This report is available online at:

<http://www.aacounty.org/OIT/Resources/CableTVNeeds.pdf>.

Initiatives to pursue similar interests via municipal broadband systems are discussed in a recent article on Bristol, Virginia:

<http://www.gatewayva.com/biz/virginiabusiness/magazine/yr2006/nov06/tele1.shtml> in which Verizon makes the point that "'fiber diversity,' or redundancy" – availability of broadband service from more than one provider – attracts businesses to a community.

While each local community must balance these interests appropriately with the community's other needs and interests, and may or may not be able to negotiate with a cable operator specific provisions for these interests, the presence of these interests in needs assessments demonstrates that concern (and competition among communities) for business growth provides an additional incentive to local communities to offer cable franchises on fair terms.

been disappointed by the fact that the ILECs have frequently demanded special concessions and extraordinary terms as their price for consenting to enter the market.¹⁴ The Maryland Counties decry the ILECs' attempts to use the widespread interest in competition as leverage to extract subsidies, reduce requirements, eliminate community benefits such as free service to schools, and exact other special benefits for themselves in franchise agreements – and to encourage the imposition of unnecessary federal regulations.

B. Local Communities Welcomed Overbuilders in the Pre-Convergence Era.

In those few cases where cable operators were willing to compete with each other prior to the late 1990s, local communities welcomed the competitors and adapted cable franchises to facilitate entry into the video market while maintaining fair treatment toward each party. Such cases were few because, prior to the “convergence” of technologies that enabled a single system to offer voice and data as well as video, very few takers were available for a second franchise. Where a second provider was willing to penetrate that market, however, it generally found concrete evidence of local communities' willingness to enable video competition.

Anne Arundel County represents one of those rare examples. Here, both Comcast Cable of Maryland, Inc., and Millennium Digital Media offer cable service to the same subscribers throughout much of the County. These companies and their predecessors have offered competitive service to a large portion of the County since 1985. Each franchise has passed through at least one renewal. In each case, the County and the company were able to reach an agreement reasonably satisfactory to both parties. (More recently, Anne Arundel County also

¹⁴ See, e.g., Maryland Counties Reply Comments at 17-36.

negotiated a franchise with Verizon, making that company the third wireline competitor in the County.)¹⁵

Not only has Anne Arundel exercised its franchising authority effectively to bring competitive service to its citizens; beyond this, the County has consistently taken the position that competition is too valuable to be given up. The importance the County places on video competition is demonstrated by the fact that the County declined on more than one occasion to allow one competitor to buy out the other. In at least two cases during the past twelve years, one of the then-current cable operators proposed to transfer its system to the other. In each instance, the operators offered to agree to conditions that purported to maintain the benefits County citizens have long gained from competition. In each case, however, the County concluded that the disadvantages of reducing the cable service market to a single provider would outweigh any guarantees proffered by the would-be merger candidates. The County declined to consent to the buyouts, and the transactions did not take place.

It is noteworthy that only the County's franchising authority prevented the *elimination* of competition in these cases. Under the cable operators' franchises, the County's consent was required for the transfer (just as a party to any such contract is generally required to consent to the substitution of a new entity to perform under the contract). Cable operators or ILECs tend to see such requirements as burdens on their freedom of action. But in these cases, the companies' preferred actions would have eliminated competition from the market. Only the County's rights under its franchises allowed it to *maintain* competition.¹⁶

¹⁵ The Verizon franchise agreement is available online at www.aacounty.org/oit/cabletv.cfm.

¹⁶ The Cable Act recognizes a local community's right to use its franchise authority to prevent the elimination or reduction of competition. *See* 47 U.S.C. § 533(d).

A similar case occurred in the St. Louis area, where, shortly after Charter Communications bought the former TCI-AT&T systems in the St. Louis metropolitan area, Charter also sought to buy out Cable America, which had overbuilt the City of Maryland Heights in its entirety. There, again, the Maryland Heights City Council declined to approve the transfer, and competition was preserved.

C. Local Communities Opened Their Public Rights-of-Way to New Entrants in the Mid-1990s.

When more companies began seeking to overbuild incumbent cable operators in the “triple play” era of the mid-1990s, local communities again opened their public rights-of-way to the newcomers, often over the objections of the incumbents. For example, Montgomery County granted RCN (then operating under the auspices of a joint venture called Starpower Communications, L.L.C.) a franchise in 1999. This overbuild franchise incorporated obligations basically similar to those of the incumbent. However, the County recognized that in this case RCN’s need to construct a new network from scratch placed it in a different economic situation from that of the incumbent. While the County would have preferred to have competition at once in every part of the County, it was willing to adjust RCN’s build-out requirements to provide for the maximum expansion of competition consistent with the financial viability of the new network builder.¹⁷ Because of its direct familiarity with the geography and demographics, the County (rather than a distant state or federal agency) was in the best position to evaluate the applicant’s claims and negotiate a reasonable compromise.

Moreover, the County’s continuing, active oversight of the expansion placed it in the best position to respond to changing circumstances. When changes in the market – the dot-com crash

¹⁷ It should also be kept in mind that the original cable franchise of the incumbent generally allowed an extended period for build-out.

of the 2000 period – adversely affected RCN’s access to financial resources, the County worked with the provider and revised the franchise agreement and build-out requirements so that it would not be financially impossible for the overbuilder to survive, while, again, maintaining the maximum possible reach of competition in the County under the circumstances.

Many other communities also offered franchises to overbuilders during the dot-com boom period. Often their experiences underlined the fact that economic factors and industry decisions, not the franchise process, controlled whether a competitive system would ever be built. For example, the City of St. Peters, Missouri, near St. Louis, granted a franchise to WideOpenWest (“WOW”) in 2000. Six months later, WOW had not yet begun construction when it abandoned its St. Peters franchise in favor of putting its capital resources into purchasing an existing Ameritech video system in Illinois, which WOW bought from SBC when the latter decided to terminate Ameritech’s video business. Here, again, the franchise process enabled competitive entry – until the entrant decided not to compete.¹⁸

D. Local Communities Sought to Accommodate the Legitimate Needs of ILECs When These Companies Decided to Enter the Market.

After the Telecommunications Act of 1996 allowed ILECs to enter the video market in their telephone service areas,¹⁹ for many years they showed little inclination to do so. Finally,

¹⁸ The City of Los Angeles had similar experiences. In 2001, the city granted a competitive franchise to Winfirst. In 2002, the city granted another franchise to Altrio Communications Inc., an open video system provider. However, Winfirst declared bankruptcy in 2002 and subsequently went out of business; Altrio went out of business in 2003. Neither company ever provided video service in Los Angeles. *See* Comments of the City of Los Angeles Regarding Cable Franchising, MB Docket No. 05-311, at 15 (filed Feb. 15, 2006).

¹⁹ The ILECs had always been able to enter the video market outside their telephone service areas, even under the telco-cable ban of the pre-1996 federal law. For example, SBC acquired the cable system in Montgomery County in 1993. As it did again later in the Ameritech experience, however, SBC backed out of the video market. In 1998, SBC sold the Montgomery County system to Prime Communications – Potomac, LLC.

about eight years after the 1996 Act, some of the ILECs – Verizon in particular – began to take a serious interest in video competition. Where the ILECs sought local franchises, local communities sought to accommodate their legitimate needs.²⁰

The reasons why it takes Verizon a long time to negotiate a cable franchise have been discussed in detail elsewhere.²¹ Here, it suffices to note the end result. To take the Washington, D.C., area as an example, Verizon stated in a June 29, 2006, press release that “Montgomery County is the only place in the Washington metropolitan area where Verizon has sought a franchise and has not been able to obtain one. In Maryland, Howard County, Bowie and Laurel have all granted Verizon a franchise; Anne Arundel County is poised to do so July 5; and Verizon’s negotiations with Prince George’s County are on track for an agreement by late summer. In northern Virginia, Verizon has obtained franchises from Arlington, Fairfax, Loudoun and Prince William counties; the City of Fairfax, Dumfries, Herndon, Falls Church and Leesburg; and the Marine Corps Base at Quantico.” As discussed below, Verizon has now completed its roster by agreeing on a franchise with Montgomery County.²²

²⁰ As noted above, some earlier forays were made by Ameritech, but these competitive cable systems were sold off when Ameritech was acquired by SBC.

It should be noted that some ILECs such as AT&T (the former SBC) have not sought local cable franchises and thus cannot have been disadvantaged or delayed by any franchising process.

²¹ See Maryland Counties Reply Comments at 12-38.

²² Verizon News Release, “Verizon Goes to Court to Break Impasse and Bring Cable Choice, Lower Prices to Montgomery County, Maryland” at 3 (June 29, 2006), available at:

<http://newscenter.verizon.com/press-releases/verizon/2006/page.jsp?itemID=29669863>.

Verizon’s news release on the recent agreement with the County is in the same location at [...2006/verizon-reaches-agreement-on.html](http://newscenter.verizon.com/press-releases/verizon/2006/page.jsp?itemID=29669863).

Nor did the franchising process delay Verizon's deployment in the Washington area. Verizon began its construction of its FiOS network (as an "upgrade" to its telephone network) well before it commenced franchise negotiations. Its construction progress was not affected by cable franchise negotiations. And Verizon's actual offering of video service has not caught up with its franchise grants: there are still large areas of those communities in which Verizon already has cable franchises that lack Verizon video service.²³ The actual spread of competition is thus being limited by Verizon's ability to construct and activate its video carriage system, not by franchising.

Montgomery County itself is a separate case. There, Verizon elected to sue the County in June, 2006, rather than to continue franchise negotiations. After negotiations resumed under the oversight of a court-appointed mediator, the County Executive and Verizon were able to agree promptly on franchise terms similar to those already agreed to by Verizon in Fairfax County. The proposed franchise agreement was approved by the Montgomery County Council on November 28, 2006, just five months later.

Thus, as one would expect given their stewardship of their citizens' needs and interests, local communities have consistently used the franchising process to bring cable competitors into the public rights-of-way and enable video competition.

Nationwide, Verizon stated as of late October that it had gained more than 180 franchises covering 3.5 million households. *Broadcasting & Cable TV Fax*, Oct. 26, 2006, at 3. As of late September, Verizon's FiOS service actually passed only one million of those households, with a goal of passing 1.8 million – about half the number covered by its franchises – by the end of 2006. *Broadcasting & Cable TV Fax*, Sept. 28, 2006, at 2.

²³ See, e.g., Jon Kreucher, *Forced Franchising: Why Telephone Industry Calls For "Shall Issue" Video Franchising Shouldn't Be Answered*, Position Paper published by ICMA (the International City/County Management Association) at 45 (October 2006). This report is available online at <http://www.icma.org/main/ld.asp?ldid=20177&p=1&t=0>.

E. Build-Out Requirements Encourage System Deployment.

One feature of local franchising in particular that has aided the expansion of video service is the build-out standard generally incorporated in a franchise. Local communities have always recognized that the expansion of service to as many citizens as possible is of great importance. Hence cable franchises include different build-out requirements carefully worked out, case by case, in view of the particular geography and demography of the communities involved. These requirements balance the economic interests of the operator with the community's need to maximize deployment. Generally they include density limitations – for example, the operator need not build where there are fewer than eighteen homes per mile (or twenty, or thirty, depending on the circumstances), unless those who want service pay the additional costs. These limitations are negotiated in detail by the operator and the community, and represent a compromise between the financial interests of the operator and the community's drive to expand deployment.

Local governments also seek to ensure that deployment is not limited to high-income neighborhoods, but that service is offered equally in low-income areas of the same density. For example, Montgomery County negotiated to have Poolesville included in Verizon's service area once the company acquires 75,000 customers in the County. This area was not included in Verizon's original proposal. However, the negotiators were able to conclude that once Verizon is 75,000 customers strong it should be able to extend service to an area that is less dense and less profitable.

Such intelligently constructed build-out requirements have resulted in *both* wide availability of cable service *and* financial success by cable operators. The same franchising process, if it is not constrained by unnecessary federal regulation, can arrive at similar agreements with overbuilders such as the ILECs.

The telephone industry, by contrast, appears to take the position that a complete absence of build-out requirements will result in the most extensive possible build-outs.²⁴ This is not plausible. A build-out scheme selected solely by the ILEC will result in just the degree of deployment that maximizes profits for the ILEC. A build-out scheme *negotiated* with the ILEC through the franchising process, on the other hand, can result in a compromise that constitutes a trade-off between higher profits and greater deployment. It is hard to imagine why such a compromise would produce *less* deployment, as the ILECs seem to argue, when the point of the negotiation from the local community's point of view is to move the agreement toward *greater* deployment.

To suppose that a purely ILEC-driven build-out schedule would produce the fastest possible deployment makes no sense. An ILEC may well feel that it can make more money by offering high-end services to a few users on a small system than by building a larger system including other users who purchase more modest services. Just as the ILECs refrained from involvement in the video market altogether for many years after the 1996 Act, based on their perceptions of profitability, they have every incentive to limit their investment now to the areas of maximum profitability. Thus, the strategy recommended by the Bell companies of giving them special benefits *without any corresponding deployment requirement*, in the mere hope that they will invest the profits in further deployment, is absurd.²⁵

²⁴ See, e.g., BellSouth's Oct. 18, 2006, *ex parte* filing at 3.

²⁵ One recent line of argument by an ILEC deserves particular comment. BellSouth's Oct. 18, 2006, *ex parte* filing at 3, states: "The suggestion that low-income consumers would not enjoy the benefits of cable competition absent a build-out requirement is belied by the broad availability of . . . basic Internet access, which was achieved without mandatory build-out requirements." By "basic Internet access," however, BellSouth appears to mean dial-up service. (The source document cited by the company, for example, refers to the expansion of Internet access over the period 1993-2004.) But dial-up Internet access became widely available precisely because *it required nothing but a conventional common carrier telephone line*, and

F. ILEC Criticisms of Local Franchising Remain Unfounded.

While ILECs have complained very loudly about local franchising, their filings in Docket 05-311 have failed to identify cases where local franchising has delayed competitive entry. Almost all of the examples the ILECs claim to cite fail to identify the community about which they complain. This means that the ILECs' allegations cannot be investigated and refuted by those whose actions have been impugned. Such mere innuendo cannot be considered by the Commission as part of the record in either proceeding.²⁶ Moreover, in those few cases where the industry has actually made a specific, identifiable accusation, it has generally turned out to be spurious.²⁷ Thus, there is no basis in the record for disputing the basic facts about the pro-competitive effect of local franchising described above.

III. STATE FRANCHISING LAWS HAVE NOT SIGNIFICANTLY IMPROVED COMPETITION.

The NOI raises the issue of how "developments at the state level" have affected video competition. The developments in question are state laws passed in the last fifteen months that deprive local communities of franchising authority or, in some cases, preserve the technical grant of a local franchise but establish all significant terms and conditions at the state level.²⁸ (For simplicity, such state regimes will be referred to here as "state franchising," although the discussion here does not address state franchise arrangements that predate the current ILEC lobbying campaign, such as Vermont's or Hawaii's.) These state laws, passed at the instigation

conventional telephone lines had been subject for decades to extensive federal and state regulation to maximize deployment. No new network construction was needed for dial-up Internet access.

²⁶ See Maryland Counties Reply Comments at 5-8.

²⁷ See, e.g., Maryland Counties Reply Comments at 8-10.

of the ILECs, purported to accelerate the spread of video competition by eliminating local franchise negotiations.

The evidence to date appears to indicate that state franchising has had very little effect in facilitating ILEC entry into cable. Rather, it has primarily resulted in reducing the benefits provided to the public by incumbent cable operators, who are frequently permitted by such laws to escape their existing contracts in favor of more lax conditions defined by state law.²⁹

For example, the results in Texas, where S.B. No. 5 was signed into law on September 7, 2005,³⁰ suggest that state franchising may have had very little effect on facilitating ILEC entry into cable. The Texas Public Utilities Commission maintains a directory of all companies that have received a “state-issued certificate of franchise authority” since the passage of S.B. No. 5.³¹ At this point, over a year after state franchising was passed, of the 37 “NEW” applications documented in this directory, only two have been made by ILECs.³² Perhaps even more troubling, of these 37 “NEW” applicants, at least twelve appear to be incumbent cable operators escaping the terms of negotiated franchises, without any evidence that service (much less competition) has been expanded at all.³³ According to a recent ICMA white paper, it appears

²⁸ NOI at ¶ 12 & n.13.

²⁹ These comments do not address the issue of the validity of state laws that impair the obligation of contracts.

³⁰ See Tex. Util. Code Ann. §§ 66.001- 66.017.

³¹ See http://www.puc.state.tx.us/cable/directories/SICFA/SICFA_Directory.htm (last visited on 11/27/06).

³² See Project # 31817 (GTE Southwest Incorporated d/b/a Verizon Southwest, filed 9/20/05); Project # 31868 (Southwestern Bell Telephone, L.P. d/b/a SBC Texas, filed 10/10/05).

³³ These entities include: Grande Communications Networks, Inc.; Time Warner Cable, Cable One, Inc., Cox Communications; Comcast; and Charter Communications. Of the

that by the end of 2006 Verizon and AT&T “will provide video competition in *portions* of just 42 of Texas' 1,210 incorporated communities by the end of 2006 – fewer than 4 percent of all cities in Texas. By the end of this year, just *parts* of 6 of Texas' 254 counties will have seen the telephone companies' new broadband services, *i.e.*, less than 3 percent of all counties.”³⁴ It appears that only a minuscule fraction of the Texas population has seen any benefit from the state franchising law promoted by AT&T and Verizon.

Similarly, in Virginia, where state franchising was passed eight months ago, the Maryland Counties are not aware of any cases in which an applicant has received the new state-controlled “ordinance cable franchise.” While Verizon had obtained franchises in fourteen counties in Virginia by the end of October (in addition to some cities and towns),³⁵ to the best of the Maryland Counties’ knowledge these were all negotiated local franchises. There appears to be no evidence that in any case a competitor entered the market that would not have done so in the absence of the state law, or entered sooner than it would have done absent the state law.

Thus, there is no evidence that state franchising in Texas or Virginia has done anything significant to bring about new deployment or increased competition. It is, however, difficult to obtain detailed facts on these points in the absence of reporting requirements for the process of deployment (even leaving aside the question of whether a new state law *caused* competitive entry, or whether the deployment would have occurred anyway). To obtain a clear picture of the facts in this area, we recommend that the Commission require the ILECs and MSOs in the states that have passed state franchising laws since September 2005 to file with the Commission, on the record for public examination and analysis, the necessary data. In particular, the Maryland

remaining “NEW” applicants, many may also be incumbent cable operators; their status is not obvious from the names alone.

³⁴ Kreucher, *Forced Franchising* at 49-50 (full citation above at n.23) (emphasis added).

Counties suggest that the ILECs be required to list the number of homes to which they were (a) technically and (b) legally able to offer cable service at the time the state law was passed; the number of homes to which they are now (c) technically and (d) legally able to offer cable service; and the number to which they now actually (e) offer and (f) provide service. The ILECs should list each local and state franchise they hold in these states, whether it was negotiated with the local community or obtained under the new state law, when it was obtained, and how many homes they pass in each such franchise area. MSOs should be required to list the communities in which they have “opted out” of a local franchise under a state law and the number of homes passed in each of those franchise areas.

If the state franchising laws so vigorously advocated by the ILECs themselves are failing to make a difference in the progress of ILEC competition, then *a fortiori* it is unlikely that new federal regulations imposed by the Commission at the federal level could do so. Thus, the Commission should refrain from imposing any new “third tier of regulation” (over and above federal and state statutory law) on local communities’ negotiations with cable operators, unless and until the Commission can show, among other things, that similar state regulation is having a significantly beneficial effect – and that the additional burden of Commission regulations would produce a significantly *greater* beneficial effect (for the citizenry as a whole, not merely for the regulated industry).

IV. LOCAL FRANCHISING ENHANCES VIDEO SERVICE BY PRODUCING LOCALLY ORIGINATED PROGRAMMING.

The NOI specifically requests comment on the provision of public, educational, and governmental (“PEG”) access programming under the heading of “locally originated

³⁵ See *Broadcasting & Cable TV Fax*, Oct. 26, 2006, at 3.

programming.” The NOI also inquires about local video-on-demand content.³⁶ These issues are closely tied to local franchising.

A. Public, Educational, and Governmental Access Channels Provide Key Local Programming.

PEG channels are the pre-eminent examples of local programming. Not only is the content of such channels largely produced locally; in addition, the very allocation of channels and resources is based on local needs and interests. Educational access channels normally provide content from local schools – primary, secondary, college-level – including telecourses offered by these local institutions. Public access is typically devoted to material produced by, or occasionally sponsored by, citizens of the community. And governmental access allows citizens to monitor directly the workings of their local governments in council meetings, school board meetings, planning and zoning meetings, and the like, in addition to allowing the local government an outlet for public service information generally.

Citizens’ interest in the various types of PEG programming varies from place to place, and over time. This is why it makes sense for local communities to decide what level of PEG capacity and support is needed through periodic franchise negotiations. The range of possibilities is aptly illustrated by the Maryland Counties.

The Montgomery County franchise agreements with Comcast and RCN provide for thirteen PEG access channels.³⁷ Nine of these are specifically allocated: educational access for the County schools, Montgomery College, and the University of Maryland; two public access channels managed by a third-party nonprofit entity; and governmental access channels used by

³⁶ NOI at ¶¶ 15, 78.

³⁷ See § 7(a) in each franchise agreement. The agreements are available online at:

the County, the City of Rockville, the City of Takoma Park, and the County Chapter of the Maryland Municipal League (representing about eighteen other cities and towns in the County).³⁸ The remaining channels are reserved for later expansion if necessary (and are being used by the cable operator until they are needed). It may be noted that the particular allocation of channels here is obviously dependent on the unique characteristics and interests of the local governments within the County, and that the programming reflects the needs and interests of a very diverse and forward-thinking County – something that could not be determined from outside by a state- or federal-level assignment of channels, much less matched by any generic set of standardized terms.

Anne Arundel County determined on the basis of its recent needs assessments that four PEG access channels should be included in the franchise requirements, with the potential for a fifth channel for the cablecast of court proceedings if Maryland law should be changed to permit the broadcasting of such proceedings. This requirement is incorporated in all three of its franchise agreements, with Comcast, Millennium, and Verizon.³⁹ In addition, however, the planned development of Heritage Harbour in the County has always operated its own access channel. Thus, a separate provision establishes that channel in the Comcast and Verizon agreements – but not in Millennium’s, because Heritage Harbour does not lie within the area served by Millennium.⁴⁰ Here, again, specific local needs and interests are paramount.

<http://www.montgomerycountymd.gov/mcgtmpl.asp?url=/content/cableoffice/cableproviders2.asp>.

³⁸ Gaithersburg is not included, as that city has its own cable franchise independent of the County’s. The County acts as an agent to administer the franchises of the other cities and towns within its borders, including Rockville and Takoma Park.

³⁹ See § 5.1.1 of each agreement.

⁴⁰ See § 5.1.4 of the Comcast and Verizon agreements.

In another example, the City of St. Louis's 2001 franchise agreement with Charter provides for six access channels: one for elementary and secondary education use; one for use by universities and colleges; one public access channel and one noncommercial community access channel; and two local government access channels.⁴¹ A statistically valid telephone survey in 1999 showed that a large percentage of the City's population felt this local programming was valuable – probably at least as large a fraction of the audience as is attached to some commercial “niche” channels.⁴²

B. Franchises Allow Local Communities to Provide for New Ways of Delivering PEG Programming.

Traditional PEG programming has consisted of linear schedules on designated channels, like those of other broadcast and cable networks. And, just as the mainstay of commercial cable programming continues to be such linear scheduling, there is no reason to suppose that the need for dedicated PEG channels will go away any time soon. However, local communities are also looking toward the future with respect to local PEG programming. Just as there are commercial programs that may best be offered on (for example) a video-on-demand basis, so a local community may find that some of its local programming is appropriate for distribution other than through traditional channels.

For this reason, some recent franchises provide for non-channelized capacity that can enable innovations such as two-way or “sideband” PEG programming. The Montgomery

⁴¹ See § 7(D)(2) of the franchise agreement.

⁴² For example, survey results showed that 36% watch the government channels more than once a week (6% watched every day) and that another 11% watch several times a month, while 6% tuned in at least a few times a year. Public and community access channels garnered 34% who watch periodically or frequently. The distribution of views on the importance of PEG channels included 6% who felt they were “very important,” 24% “extremely important,” and 28% “somewhat important.”

County franchises, for example, allow for a “Digital Set-aside” that may constitute as much as ten percent of the system’s total downstream capacity for PEG use, subject to certain limitations.⁴³ The Anne Arundel agreements provide for potential PEG migration to digital formats; two of them also provide for potential “PEG-on-demand” service.⁴⁴ In St. Louis, the franchise agreement allows the City to “recapture” for PEG purposes bandwidth that may be freed up by digitization and compression of the original PEG channels.⁴⁵ Each community reached a different solution with its cable operators.⁴⁶

These examples illustrate the impracticality of addressing the diversity of local needs and interests through any kind of one-size-fits-all federal framework. The Commission should make no attempt to infringe upon local communities’ rights to determine, and negotiate for, their needs and interests, as is their right under the Cable Act.⁴⁷ But the Commission should be especially attentive to the fact that non-traditional PEG arrangements developed by local governments in negotiations with their cable operators can represent fruitful alternatives for meeting individual needs and interests.

⁴³ See the Comcast franchise agreement at § 7(a)(3) and the RCN agreement at § 7(a)(2).

⁴⁴ See all three franchise agreements at § 5.1.7 (digital migration); Comcast and Millennium agreements at § 5.1.8 (PEG-on-demand). Similar assurances regarding PEG-on-demand were provided by Verizon in a side letter to the County.


⁴⁵ See franchise agreement at § 7(D)(2)(5).

⁴⁶ A variety of advanced PEG options are described on the Center for Digital Democracy’s Web site at <http://www.democraticmedia.org/ddc/CCC/CCCI.html>. A particular community’s example of a PEG-on-demand plan is referred to in Linda Haugsted, “Done Deal in Minneapolis: TWC, Comcast Offer \$20M Carrot to Consummate Swap,” *Multichannel News*, Aug. 7, 2006, p. 29.

⁴⁷ See, e.g., *Union CATV, Inc. v. City of Sturgis*, 107 F.3d 434 (6th Cir. 1997) (court defers to franchising authority’s right to determine community needs and interests through Cable Act renewal process).

For the reasons indicated above, the Bureau should acknowledge local cable franchising as a positive factor in expanding video competition and should refrain from imposing additional federal regulation on the local franchising process.

Respectfully submitted,



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Counsel for Anne Arundel County and
Montgomery County, Maryland

November 29, 2006

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CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The below-signed signatory has read the foregoing Comments of Anne Arundel County and Montgomery County, Maryland, and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,

Nov 29, 2006

Date

Frederick E. Ellrod III

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Annual Assessment of the Status of
Competition in the Market for the
Delivery of Video Programming

MB Docket No. 06-189
MB Docket No. 05-311

DECLARATION OF JOHN LYONS

I, John Lyons, declare as follows:

1. I submit this declaration in support of the Comments of Anne Arundel County, Maryland, Montgomery County, Maryland, and the City of St. Louis, Missouri. I am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.
2. I am the CATV Administrator for Anne Arundel County, and participated in the County's negotiations with Verizon regarding a cable franchise.
3. I have reviewed the Comments and am familiar with the contents thereof and the matters referred to therein insofar as they relate to Anne Arundel County.

4. I declare under penalty of perjury that the facts contained within the Comments insofar as they relate to Anne Arundel County are true and correct to the best of my knowledge and belief, and that this declaration was executed on November 28, 2006, at 44 Calvert St. Annapolis, Md.



John Lyons

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Annual Assessment of the Status of
Competition in the Market for the
Delivery of Video Programming

MB Docket No. 06-189
MB Docket No. 05-311

DECLARATION OF JANE LAWTON

I, Jane Lawton, declare as follows:

1. I submit this declaration in support of the Comments of Anne Arundel County, Maryland, Montgomery County, Maryland, and the City of St. Louis, Missouri. I am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.

2. I am Cable Communications Administrator in the Department of Technology Services of Montgomery County, Maryland, and participated in the County's negotiations with Verizon regarding a cable franchise.

3. I have reviewed the Comments and am familiar with the contents thereof and the matters referred to therein insofar as they relate to Montgomery County.

4. I declare under penalty of perjury that the facts contained within the Comments insofar as they relate to Montgomery County are true and correct to the best of my knowledge and belief, and that this declaration was executed on November ____, 2006, at ____.

Jane Lawton

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Annual Assessment of the Status of
Competition in the Market for the
Delivery of Video Programming

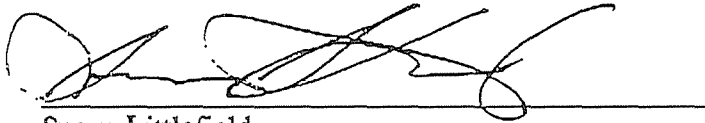
MB Docket No. 06-189
MB Docket No. 05-311

DECLARATION OF SUSAN LITTLEFIELD

I, Susan Littlefield, declare as follows:

1. I submit this declaration in support of the Comments of Anne Arundel County, Maryland, Montgomery County, Maryland, and the City of St. Louis, Missouri. I am fully competent to testify to the facts set forth herein, and if called as witness, would testify to them.
2. I am a Telecom Regulatory Manager in the Communications Division of the City of St. Louis.
3. I have reviewed the Comments and am familiar with the contents thereof and the matters referred to therein insofar as they relate to the City of St. Louis and the surrounding region.

4. I declare under penalty of perjury that the facts contained within the Comments insofar as they relate to the City of St. Louis and the surrounding region are true and correct to the best of my knowledge and belief, and that this declaration was executed on November 28, 2006, at the Communications Division, 4971 Oakland Avenue, St. Louis, Missouri 63110.

A handwritten signature in black ink, appearing to read 'Susan Littlefield', is written over a horizontal line.

Susan Littlefield

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